

## DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 92-0915 CS

Controlled Substance Excise Tax

For The Period: 09/10/92

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### ISSUES

#### **I. Controlled Substances Excise Tax – Hearings**

**Authority:** Indiana Code 6-8.1-5-1

#### **II. Controlled Substances Excise Tax - Liability**

**Authority:** Indiana Code 6-7-3 *et seq.*

#### **III. Controlled Substances Excise Tax - Liability**

**Authority:** *Bryant v. State of Indiana*, 660 N.E.2d 290 (Ind.1995), *Bailey v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995), *Hayse v. Indiana Department of State Revenue*, 660 N.E.2d 325 (Ind.1995), *Hall v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995), *Cliff v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995), *Indiana Dept. of Natural Resources v. Town of Syracuse* 686 N.E.2d 410 (Ind.App. 1997), Indiana Code 35-48-3-3. Indiana Code 25-23-1-19.6, Indiana Code 25-22.5-1-1.1 *et seq.*

#### **IV. Controlled Substances Excise Tax - Liability**

**Authority:** Indiana Code 6-7-3 *et seq.*

#### **V. Controlled Substances Excise Tax - Weight**

**Authority:** Indiana Code 35-48-1-1

#### **VI. Controlled Substances Excise Tax - Liability**

**Authority:** *Gorski v. Deering* 465 N.E.2d 759 (Ind.App. 1984).

### STATEMENT OF FACTS

On September 8, 1992, Indiana law enforcement officers entered onto the property where taxpayer lived with another individual. The officers seized several suspected marijuana plants that were later tested and weighed. Law enforcement officers also seized several caches of dried suspected marijuana and paraphernalia throughout the residence. Police found in an ashtray in the living room of the residence some suspected marijuana that was being smoked at the time the warrant was executed. All of the suspected marijuana was in fact marijuana weighing 3,858.60 grams. The search resulted in Taxpayer's and her companion's arrest for possession of marijuana weighing over 30 grams. There was no Controlled Substance Excise Tax paid on the marijuana so taxpayer was assessed Controlled Substance Excise Tax ("CSET"), penalty and interest on September 10, 1992. Taxpayer, by counsel, timely filed her protest.

#### **I. Controlled Substances Excise Tax - Hearings**

### DISCUSSION

Taxpayer asserts that she suffered an unconstitutional deprivation of due process because the department did not hear her protest, filed on October 28, 1992, until December 11, 1997. Taxpayer further states that Indiana law requires hearings set "at the department's earliest convenient time." Taxpayer however, provided no evidence of when the department had a more convenient time for the hearing. In fact, a review of the Department's file reveals that taxpayer did not pursue her own protest until after the department contacted her in March 1997. Further, taxpayer provides no evidence of any harm she suffered as a result of the length of time between protest and hearing. It is axiomatic under Indiana law that it is the taxpayer's burden to show the assessment is wrong because the assessment is *prima facie* evidence.<sup>1</sup>

It is worthwhile to note that during the time that taxpayer's protest was pending, the constitutionality of the CSET statute was the subject of litigation culminating in several decisions by our Supreme Court. If the CSET was found unconstitutional, then taxpayer's protest would have been moot and the need for a hearing alleviated.

### FINDINGS

The Department denies the taxpayer's protest.

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<sup>1</sup> Id.

## II. Controlled Substances Excise Tax – Liability

### DISCUSSION

Taxpayer next asserts that she is not liable for the CSET because she had no ownership interest in the marijuana. In support, taxpayer states that she was not an owner or tenant on the real estate upon which the marijuana was cultivated, but was merely living in the residence as a "guest" since the spring of 1991. The CSET does not require "ownership" but possession, delivery, or manufacture of a controlled substance for imposition of the tax. Taxpayer readily admitted that she was fully aware her companion cultivated the marijuana during the year and a half that she lived on the real property. Not only was marijuana being cultivated on the real property, but also quantities of processed marijuana was stored in several places in the residences to which taxpayer had access. In fact, marijuana was being smoked in the residence at the time the police arrived. The facts show that the controlled substance was manufactured and possessed where taxpayer lived. Therefore, it is difficult to find that taxpayer has supported her burden by showing, by a preponderance of evidence, that the assessment is wrong based on her self-serving statement that the marijuana was not hers, but someone else's. Although taxpayer's companion pleaded guilty to the criminal charges filed against him, he had not paid the taxes due and owing for the marijuana, therefore taxpayer is still liable.

### FINDINGS

The Department denies the taxpayer's protest.

### III. Controlled Substances Excise Tax - Liability

Next, taxpayer asserts that Indiana law requires a violation of either Indiana Code 35-48-4 or 21 U.S.C. 841 through 852. Because the county prosecutor eventually dismissed the criminal proceedings against the taxpayer, there has been no determination whether the above referenced criminal statutes were violated. Taxpayer's analysis would *require* a criminal conviction before the CSET could be applied. This would be impossible in light of the Bryant<sup>2</sup> case and its progeny<sup>2</sup>.

These cases stand for the proposition, *inter alia*, that the imposition of CSET like a criminal conviction is jeopardy under the constitution and any action after the attachment of jeopardy would be unlawful. Therefore, an application as taxpayer suggests would render the CSET unenforceable.

Because the presumption is that the legislature intended the logical application of the language of the statute consistent with its underlying goals,<sup>3</sup> we must consider the following. The mere possession of a controlled substance in Indiana violates the law, except in limited circumstances, such as prescriptive authority of doctors and advance practice nurses.<sup>4</sup> Therefore, it is reasonable to believe that the legislature's intent is to tax the unauthorized possession of controlled substances, not to tax those convicted of the possession as taxpayer suggests.

### FINDINGS

The Department denies the taxpayer's protest.

### IV. Controlled Substances Excise Tax - Liability

Taxpayer asserts that the CSET violates the 14<sup>th</sup> amendment of the United State Constitution because the tax rate for marijuana is the same as more insidious drugs such as LSD, heroin, crack cocaine etc. The Department presumes the constitutionality of tax assessments under provisions of Indiana Code 6-7-3.

### FINDINGS

The Department denies the taxpayer's protest.

### V. Controlled Substances Excise Tax - Weight

Finally, taxpayer asserts that the weight of the marijuana upon which the CSET was calculated is incorrect because the weight the Department used included the unusable stalk, stems and roots of the plant. In support of her contention, taxpayer provided a copy of a report produced by a forensic chemist, with the Greenwood Police Department, prepared for the criminal proceedings against taxpayer. According to the taxpayer, discrepancy exists because the Revenue agent weighed the stalks, stems and roots of the marijuana plants while the state police weighed only the leafy substance. Indiana law<sup>3</sup> defines marijuana as:

Any part of the plant genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and hash oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. *It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture,*

<sup>2</sup> *Bailey v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995), *Hayse v. Indiana Department of State Revenue*, 660 N.E.2d 325 (Ind.1995), *Hall v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995), *Cliff v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995)

<sup>3</sup> *Indiana Dept. of Natural Resources v. Town of Syracuse* 686 N.E.2d 410 (Ind.App. 1997).

<sup>4</sup> See, e.g., Indiana Code 35-48-3-3. Indiana Code 25-23-1-19.6, Indiana Code 25-22.5-1-1.1 et seq.

salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom); or the sterilized seed of the plant which is incapable of germination. (*emphasis added*). Since the stalks of the marijuana plant are specifically excluded from the definition of marijuana, they are not subject to Indiana's Controlled Substance Excise Tax.

#### **FINDINGS**

Taxpayer's protest is sustained. The Criminal Division is directed to adjust the assessment to reflect a weight of 896.8 grams rather than 3858.6 grams.

#### **VI. Controlled Substances Excise Tax - Liability**

Finally, taxpayer contends that she is not liable for the CSET because the evidence against her was a product of an illegal search and seizure. In support to her argument, taxpayer produces a copy of the Motion to Suppress and supporting brief she filed in the criminal proceedings against her. After hearing, at the request of the Department, taxpayer provided a copy of the Courts ruling on taxpayer's motion. The trial court Denied taxpayer's motion. The prior adjudication of this issue should bind the parties in this subsequent action when both the identity of parties and mutuality of estoppel exists<sup>4</sup>. Because the parties in this matter are the same as in the criminal proceeding, the taxpayer is collaterally estoppel from re-litigating this issue.

#### **FINDINGS**

The Department denies the taxpayer's protest.